



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
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**MEMORANDUM FOR CIVILIAN AND MILITARY PERSONNEL EMPLOYED BY AND
ASSIGNED TO THE OFFICE OF THE INSPECTOR GENERAL OF
THE DEPARTMENT OF DEFENSE**

SUBJECT: Duty of the Inspector General to Maintain Effective Working Relationships with the Department of Justice (DOJ) in the Investigation of Crimes Involving the Programs, Operations, or Personnel of the Department of Defense

References: (a) Inspector General Act of 1978, as amended
(b) Inspector General Policy Memorandum of February 10, 2003, "Inspector General Act Implementation and Office of Inspector General Policy Guidance"
(c) DoD Directive 5525.7, "Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes," of January 22, 1985

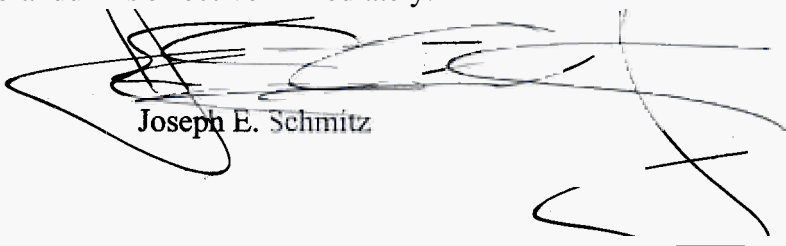
Purpose: To provide specific guidance on Section 8(c)(2) & (3) of Reference (a), consistent with the general guidance promulgated in Reference (b) and the specific direction provided in Reference (c).

Statutory Duty: Section 8(c)(2) of Reference (a) requires the Inspector General to "initiate, conduct, and supervise such . . . investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate." Section 8(c)(3) requires the Inspector General to "provide policy direction for . . . investigations relating to fraud, waste, and abuse and program effectiveness."

Regulatory Responsibilities: Section 5 of Reference (c) establishes separate and distinct "responsibilities" for investigative and prosecutive policies within the DoD by directing: (a) the Inspector General of the Department of Defense to "implement the investigative policies[, m]onitor compliance by DoD criminal investigative organizations[, and p]rovide specific guidance regarding investigative matters, as appropriate" (Section 5.1); and (b) the General Counsel of the Department of Defense to "implement the prosecutive policies[, m]onitor compliance by DoD Components regarding the prosecutive aspects[, and p]rovide specific guidance, as appropriate" (Section 5.2).

Policy Guidance: It is the policy of the Office of Inspector General to carry out the letter and the spirit of the Inspector General's explicit duties under Sections 8(c)(2) & (3) of Reference (a) as well as Section 5.1 of Reference (c). It is also the policy of this Office to "maintain effective working relationships with the DOJ in the investigation and prosecution of crimes involving the programs, operations, or personnel of the Department of Defense" (Section 3 of Reference (c)). Within the Office of Inspector General: (a) the Deputy Inspector General for Investigations shall recommend to the Inspector General "procedures to implement the investigative policies set forth in [Reference (c)]"; and (b) the Deputy Inspector General for Inspections and Policy shall "[m]onitor compliance by DoD criminal investigative organizations to the terms of [Reference (c)]." In accordance with the Inspector General's aforementioned responsibility to "[p]rovide specific guidance regarding investigative matters, as appropriate," the attached "teach & train" article further explains the distinction between "IG investigations" and "prosecution," consistently with the structure and text of Section 5 of Reference (c).

Effective Date: This Policy Memorandum is effective immediately.


Joseph E. Schmitz

Attachment:
As stated

INSPECTOR GENERAL INVESTIGATIONS: *“Dogged Pursuit of the Truth”*

by

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“What is truth?”

Pontius Pilate¹

The Inspector General Act of 1978 created a system of Inspector Generals (IGs) within the major agencies of the Federal Government, including (as amended in 1982), an Inspector General for the Department of Defense. All of these IGs are tasked by law to do, among other things, investigations within their respective Agency or Department.²

During recent Senate confirmation hearings, one of the distinguished members of the Senate Armed Services Committee asked the nominee for Inspector General of the Department of Defense to discuss his “commitment to objectivity” in the context of “an IG investigation into alleged impropriety, . . . especially in the cases that involved conflicting testimonies between victims and those that are accused of specific abuses.”³ Fortunately, United States Army instructors of “The Inspector General University” (TIG-U) had already pounded into the nominee the most basic foundational doctrine of any Inspector General investigation: “dogged pursuit of the truth.”⁴

Whether a prosecutor would ultimately “take a case” cannot influence an Inspector General’s focus on the “dogged pursuit of the truth,” especially as the Inspector General serves as “an extension of the eyes, ears, and conscience of the Commander.”⁵ Though a prosecutor may decline to prosecute, the more relevant and objective facts the military Commanders know, the better those Commanders can make informed decisions

¹ John 18:38.

² Inspector General Act of 1978, as amended, 5 U.S.C. App. 3, section 2 states the IG of the Department is charged to: 1) conduct and supervise audits and investigations within the Department; 2) provide leadership in recommending policies designed to promote efficiency and effectiveness and; 3) provide the independent mechanism of keeping Congress and the Secretary of Defense fully informed of any deficiencies within DoD and corrective actions recommended.

³ Testimony of Joseph E. Schmitz, nominee for Inspector General of the Department of Defense, to U.S. Senate Committee on Armed Services, dated October 23, 2001.

⁴ Department of Army, *The Inspections Guide*, p. 4-3-20. See also; Defense Criminal Investigation Service, *Special Agents Manual*, Chapter 3 (“Investigation is a detailed objective inquiry to ascertain the truth about an event, situation or individual.”).

⁵ Army Regulation 20-1, *Inspector General Activities and Procedures* 5 (Department of the Army, 2002).

that often affect the health, morale, and welfare -- and sometimes the lives -- of service members placed under their command.

Potentially Criminal IG Investigations

The potential consequences of allowing prosecutorial opportunities to affect investigative decisions might be gleaned from the following recent example, which is not intended to cast any negative aspersion on the military investigative component at issue: the U.S. Army's Criminal Investigation Command (USCIDC-often referred to as CID). The Army's CID, incidentally, is not part of the Army Inspector General Agency.

A Defense contractor employee approached the Army's Criminal Investigation Command alleging that fellow employees (assigned to support the Armed Forces on foreign soil) were engaged in racketeering, slavery and the sexual exploitation of children. An investigation found evidence of wrongdoing, but also concluded that the participants would not be subject to U.S. prosecution because their acts were perpetrated overseas. The results of the investigation were then referred to local national authorities. (Note that such a decision is in concert with the CID's mission of "Criminal Investigation.") When the situation became public, members of Congress wished to know why the DoD continued putting millions of dollars into this company's pockets.

The apparent anomaly that ensued from this recent example appears to have resulted from a decision dictated by a focus on the "criminal" aspects of the case and therefore prosecutorial potential. Such limitations to full field investigations are not imposed on the Inspector General Offices,⁶ whose charter focuses not on "prosecution," but on "dogged pursuit of the truth."

That IG investigations are often perceived as a search for criminal culpability rather than for the truth suggests that IG Offices may be inadvertently creating such perceptions, perhaps by their investigative conduct, the language they use, or even by the performance metrics employed. If so, we should identify and rectify those aspects creating such misconceptions. When an IG arrives on any scene, the only ones who should complain are those who do "wicked things"⁷ or tolerate wrongdoing under their authority.

⁶ Inspector General Act of 1978, as amended – 5 U.S.C. App. 3; DoD Directive 5106.1; DoD Instruction 5505.2.

⁷ John 3:20-21 ("For everyone who does wicked things hates the light and does not come toward the light, so that his works might not be exposed. But whoever lives the truth comes to the light, so that his works may be clearly seen as done in God.").

Non-Criminal IG Investigations

Within the Office of Inspector General of the Department of Defense there is an active investigative unit where prosecution is rare. The Office of Departmental Inquiries (DI) is responsible for either conducting or overseeing DoD administrative (non-criminal) investigations into alleged misconduct by senior officials. These investigations, even when allegations are substantiated,⁸ rarely lead to criminal prosecution. Rather, substantiated allegations typically lead to administrative sanctions for those held responsible for the prohibited activity (written reprimands, relief of duty, pay forfeitures, forced separation...etc.) because the substantiated allegations are seldom criminal in nature. As a result, “prosecutive merit” is not a central factor weighed against whether or how thoroughly investigations should be conducted.

Concomitantly, these administrative investigations serve a critical role in promoting integrity and efficiency in the Department of Defense. For example, it is understandable that senior civilian and military officials are strictly held to the very highest standards of ethical conduct. Alleged violations of regulations committed by a senior official must be investigated vigorously, competently, and thoroughly. Because DoD places its trust in the investigative credibility of its independent and objective IG’s, a message is sent that high ethical standards will be enforced. In short, these IG investigative capabilities help put “teeth” in the DoD ethics program.

Between 400 and 500 investigations into alleged senior official misconduct are completed throughout the Department of Defense every year – of which, some 15% substantiate some sort of misconduct.⁹ The statutory duty of the Inspector General to “be the principle adviser to the Secretary of Defense for matters relating to prevention and detection of fraud, waste, and abuse”¹⁰ lends a critical measure of independence and credibility to such investigations, which by their very nature are subject to the closest scrutiny. In the end, these objective and independent investigative processes are essential to promoting confidence in the professional tenet that DoD can police its own.

Systemic Benefits of IG Investigations

Noncriminal -- and in some cases criminal – IG investigations within the Department of Defense ought to assist DoD leadership in assessing and improving standards and policies governing conduct and decision-making. “Due process of law”¹¹ requires that rules be both “prescribed” (clear guidance from proper authority) and promulgated “in the most public and perspicuous manner.”¹² If an IG investigation

⁸ Substantiate is “support and verify with proof or evidence.” An allegation that is “substantiated” is one where the preponderance of credible evidence uncovered by systematic investigation indicates the allegation is valid and true. The substantiation standard (“preponderance of credible evidence”) of proof is not as strict the criminal standard (“beyond a reasonable doubt”) of proof.

⁹ Inspector General of the Department of Defense *Semiannual Report to the Congress*, September 30, 2002

¹⁰ Inspector General Act of 1978, as amended, 5 U.S.C. App. 3, Section 8(C)(1).

¹¹ United States Constitution, Amendment V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”)

¹² 1 Blackstone’s Commentaries 46 (1765)

determines that a standard is ambiguous, unknown, or otherwise subject to misinterpretation, systemic corrective actions are recommended. For example, recent noncriminal investigations have improved DoD policy concerning the use of government aircraft by senior officials. Justification for such travel will now be more clearly articulated, more widely published, and the approval channels defined and clarified.

Yet, the investigative benefits described above, as well as those from investigations that lead to prosecutions, are derived not from systems, regulations, and “figures,” but rather from the quality, integrity, and accountability of the people conducting them. In the IG community, senior and junior employees routinely access extraordinarily sensitive information on government personnel, national security, equipment and processes. The American public permits such access because they are confident in our trustworthiness. Perhaps we should consider that special trust and confidence as the good soil to grow better metrics for measuring the success of IG investigative units.

Instead of feeding the common misconception that the only successful investigation is one that leads to prosecution, perhaps our metrics should focus on the most critical factor for organizational success: our human capital. Consider the following non-prosecution based two alternative metrics for success of IG investigative units. The first metric might measure our relative success in attracting, hiring, and retaining the very best investigators over time. The “best” is difficult to define, let alone measure directly. However, reasonable inferences of improved staff quality, recruitment, and retention are certainly quantifiable if given the priority they deserve. A second metric might measure “accountability” within our IG organizations. In other words, an “accountability index,” consistently applied, administered, and evaluated. Such an index needs internal assessments (how organic staff and management view agreed-upon criteria of the organization’s accountability), as well as systemic measures of how IG clients view the organization’s accountability.

Conclusion

Although there are obvious linkages, an Inspector General investigation DOES NOT depend on prosecutorial merit. Furthermore, it is an IG responsibility and duty to teach the distinctions between investigation and prosecution.¹³ Truth has value in and of itself, and that certainly includes times when the truth is that no wrongdoing existed. It is no small matter to be subject to the rule of law, to be under oath, and to be accountable for ensuring “due process.” The Inspector General Act requires independent and objective investigations and a “dogged pursuit of the truth” regardless of prosecutorial merit.

¹³ Based on the Inspector General Act of 1978, as amended in, DoD Directive 5525.7, dated 22 January 1985, specifically implements a Memorandum of Understanding between the Department of Justice and Department of Defense relating to investigation and prosecution. The Directive assigns the Inspector General for Department of Defense the responsibility to “establish procedures to implement the investigative policies . . . ” and to the General Counsel for Department of Defense the responsibility to “establish procedures to implement the prosecutive policies”